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No. 639

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

WILLIAM BROADNAX,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William Broadnax, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on June 2, 1965, rehearing denied August 4, 1965, affirming a judgment by the United States District Court for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW

The judgment and commitment of petitioner entered on January 27, 1964 by the United States District Court for the Eastern District of Michigan, Southern Division, appears in Appendix A hereto, *infra,* page 11. No opinion was rendered by said Court.

The judgment and opinion of the United States Court of Appeals, Sixth Circuit, was entered on June 2, 1965 affirming the judgment of the United States District Court, a copy of which judgment and opinion is appended hereto as Appendix B, *infra,* page 12. A Petition for Rehearing was denied by said Court, without opinion, on August 4, 1965 and appears in Appendix C, *infra,* page 14.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered June 2, 1965 (Appendix B, *infra,* page 12). A timely Petition for Rehearing was denied on August 4, 1965 (Appendix C, *infra,* page 14).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) (Appendix D, *infra,* page 15).

QUESTIONS PRESENTED

The sole question involved is whether the search warrant issued in this cause was invalid depriving petitioner of his rights as guaranteed him by the Fourth Amendment to the U. S. Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the Fourth Amendment to the United States Constitution. The statutory provisions involved are 26 U.S.C., Sec. 5205 (a)(2) and 26 USC. Sec. 5604 (a)(1).

The constitutional and statutory provisions are printed in Appendix D, *infra*, page 15.

STATEMENT OF THE CASE

I. Procedural History of the Case

Petitioner was indicted by the United States District Court for the Eastern District of Michigan, Southern Division, for an alleged violation of 26 U.S.C. Sec. 5205 and 5604 (Appendix D, *infra*, page 15), and convicted on January 27, 1964.

On January 27, 1964 the petitioner was committed by said Court to the custody of the attorney general for a period of three years under the provisions of Sec. 4208 (a)(2), Title 18, U.S.C. (Appendix A, *infra*, page 11).

Notice of Appeal from the judgment and sentence of the U. S. District Court was filed on behalf of petitioner on September 25, 1964.

On June 2, 1965 the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court (Appendix B, *infra*, page 12). Rehearing was denied on August 4, 1965 (Appendix C, *infra*, page 14).

II. Facts

On June 5, 1961 a search warrant was issued by a Judge of the District Court upon an affidavit of an agent of the Alcohol and Tobacco Tax Unit of the United States Government authorizing the search of premises known as 3360 E. Congress, Detroit, Michigan, and the garage in the rear of said premises.

On June 6, 1961 agents entered said premises, and arrested the petitioner, William Broadnax and Zella Bond and Aubrey Smith, and found one-half gallon of alleged illicit whiskey in the bedroom occupied by William Broadnax and Zella Bond. In an automobile in the garage they found seven gallons of whiskey. An information was filed against petitioner and Zella Bond for possession of the one-half gallon of illicit non-tax paid whiskey found in the house. The charge against Zella Bond was dismissed the day before petitioner's trial. Petitioner was tried and convicted of said charge.

The affidavit upon which the search warrant was based stated as follows:

> "The undersigned being duly sworn deposes and says:
>
> That he (has reason to believe) that (on the premises known as) a two-and-one-half story frame dwelling house painted brown and located on the south side of East Congress Street in the City of Detroit, County of Wayne, Michigan. This dwelling house is the 12th dwelling west of Lieb Street and bears the number *3360 East Congress, Detroit,* Michigan. Place to be searched is the entire first floor of this building and any part of the basement or attic used by the householder as well as the garage located at the rear of the lot, in the East-

ern District of Michigan there is now being concealed certain property intended for use in violation of the Internal Revenue Code pertaining to distilled spirits, to-wit: distilled spirits on which tax has not been paid according to law, which are intended for use in violation of Section 5601(a)(12), 5205 (a)(2), 7201, 7302, 5686(a) and 7206(4), Title 26, United States Code.

On May 17, 1961, reliable information was received by me that William Broadnax, a known violator was handling large amounts of non tax paid whiskey at 3360 East Congress Street, Detroit, Michigan. I was further informed that this non tax paid whiskey was delivered by a brown Ford which delivered this non tax paid whiskey via the alley which runs at the rear of 3360 East Congress Street, Detroit, Michigan.

On May 31, 1961, at approximately 7:45 a.m. I observed a brown Ford bearing 1961 Michigan license JY 52-04, drive into the alley from Lieb Street and back into the garage at the rear of 3360 East Congress Street, Detroit. In approximately 10 minutes this car was driven out of the garage and was parked in the alley.

On May 31, 1961, at approximately 8:00 a.m. I observed William Broadnax walk into the alley after entering it from garage at the rear of 3360 East Congress Street, Detroit. William Broadnax was carrying what appeared to be a one gallon glass jug which was covered by a paper sack. He was observed setting this brown paper sack on the ground next to a gray Ford bearing 1961 Michigan license FP 83-89. This paper sack which appeared to contain the one gallon glass jug was put into the trunk of the brown Ford by the driver of this vehicle who had been observed at 7:45 a.m. backing this car into the garage at the rear of 3360 East Congress Street, Detroit.

On May 31, 1961, at approximately 8:20 a.m. William Broadnax was observed by me opening garage doors at the rear of 3360 East Congress and opening the trunk of the brown Ford, and was present when the driver of this vehicle was observed by me carrying two cartons from the garage of the size and shape commonly used to contain 4 one-gallon jugs of non tax paid whiskey. William Broadnax closed the trunk of the brown Ford and was observed by me returning to the dwelling house at 3360 East Congress, Detroit.

On May 31, 1961, at approximately 8:25 a.m. I observed William Broadnax leave the garage at 3360 East Congress Street, Detroit, and walk east in the alley to Lieb Street and enter a 1961 Michigan license JY 21-94 and depart shortly thereafter heading north on Lieb Street.

On May 31, 1961, the brown Ford returned and parked in a vacant area at the rear of the residence located on Larned Street. At the time the driver opened the door of this brown Ford, I observed several paper sacks on the floor of the rear seat. These bags are of the type commonly used to cover one gallon glass jugs of non tax paid whiskey. The driver of this brown Ford entered the property at 3360 East Congress Street, Detroit.

On May 31, 1961, at approximately 11:25 a.m. I observed the brown Ford enter the alley from Lieb Street and park next to the gray Ford bearing 1961 Michigan license FP 83-89. A tire was removed from the brown Ford, and the driver of this vehicle after removing what appeared to be a flat tire from the right front wheel of the gray Ford, replaced same with a tire removed from the brown Ford. The flat tire from the gray Ford was observed by me being taken into the rear of 3360 East Congress, Detroit, Michigan.

On June 1, 1961, at approximately 8:05 a.m. I observed the brown Ford enter the alley from Lieb Street and park at the rear of the garage at 3360 East Congress, Detroit. The driver of this brown Ford walked into the dwelling house at 3360 East Congress and appeared shortly thereafter. He was observed opening the trunk of the brown Ford and removing a cardboard carton of the size and shape used to contain 4 one-gallon glass jugs of non tax paid whiskey. He was observed by me entering the back steps of the residence at 3360 East Congress, Detroit, Michigan.

Nowhere on the above described premises did I observe a sign denoting this dwelling to be a registered distillery, wholesale liquor dealer or retail liquor dealer.

I have been employed by the Alcohol and Tobacco Tax Division of the U.S. Treasury Department for a period in excess of 10 years and am familiar with the type of packages and containers commonly used to package non tax paid whiskey and with the method and operation of this type of operation.

/s/ Henry J. Lannoo
Investigator, A&TTD

Sworn to before me, and subscribed in my presence, June 5, 1961.

/s/ Theodore Levin
U. S. District Judge"

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE AN IMPORTANT QUESTION AFFECTING THE RIGHTS OF THE ACCUSED TO REASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT IS INVOLVED.

Petitioner contends that the search warrant issued in this cause was invalid because its issuance was not based upon probable cause to believe that there was illicit whiskey on the premises at 3360 E. Congress, Detroit, Michigan.

The affidavit upon which the search warrant was based merely alleges that the agent on three or 4 occasions saw the petitioner, William Broadnax and another man carry cardbox carton of the size and shape usually used to contain jars which usually contain liquor, into an automobile, and into a house at 3360 East Congress, Detroit, Michigan.

The Fourth Amendment prohibits the issuance of a search warrant, "'but upon probable cause, supported by oath or affirmation". Procedure for issuance of a search warrant pursuant to Rule 41(c) of the Federal Rules of Criminal Procedure provides that the warrant shall issue on affidavit "If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist * * *."

Petitioner contends that the affidavit upon which the search warrant was based was insufficient to show probable cause.

Probable cause has been interpreted and defined by the Supreme Court in *Brinegar v. United States,* 338 U.S. 160, at pp. 175-176, 69 S.Ct. 1302, at p. 1310, 93 L.ed. 1879, as follows:

> "In dealing with probable cause, however as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considertaions of everyday life on which reasonable and prudent men, not legal technicians act. The standard of proof is accordingly correlative to what must be proved.
>
> The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. *McCarthy v. DeArmit,* 99 Pa. St. 63, 69, quoted with approval in the Carroll opinion 267 U.S. (132) at 161 (45 S. Ct. 280, 69 L.Ed. 543). And this 'means less than evidence which would justify condemnation or conviction,' as Marshall, C.J. said for the Court more than a century ago in *Locke v. United States,* 7 Cranch 339, 348 (3 L. Ed. 364). Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their (the officers' knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' *Carroll v. United States,* 267 U.S. 132, 162 (45 S. Ct. 280, 69 L. Ed. 543)."

The Sixth Circuit Court of Appeals in the recently decided gambling tax cases of the *United States v. Woodson,* 303 F.2d 49, and *United States v. Nicholson,* 303 F.2d 330, in considering the sufficiency of affidavits on which warrants were based and issued, relied largely on the test of probable cause laid down in *Brinegar* and in *Nicholson* the Court said:

> "Whether probable cause exists requires an act of judgment formed in the light of the particular situation and with account taken of all the circumstances."

In ruling that the affidavit upon which the search warrant was based was sufficient to show probable cause, the U. S. District Court stated in its opinion that the affidavit contained the observation of the affiant that the defendant, William Broadnax was observed carrying two cartons of the size and shape commonly used to contain four 1-gallon jugs of non-tax paid whiskey from his automobile into his home. Nowhere in the affidavit which is set out in full on pages 4 through 7 *infra*, does this appear. Petitioner believes that perhaps the Court may have misread said affidavit.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL POSSNER,
Attorney for Petitioner,
712 Penobscot Building,
Detroit 26, Michigan.

Dated: Detroit, Michigan,
September 28, 1965.

APPENDIX A

JUDGMENT AND COMMITMENT

(Filed January 27, 1964)

On this 27th day of January, 1964, came the attorney for the Government and the defendant appeared in person and by counsel.

It is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of unlawful possession of distilled spirits, in violation of Sections 5205(a)(2) and 5604(a)(1), Title 26, USC, as charged in the information, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) years, and to become eligible for parole at such time as the Board of Parole may determine, as provided in Section 4208(a)(2), Title 18, USC.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Talbot Smith
United States District Judge

APPENDIX B

No. 16012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,
v.
William Broadnax,
Defendant-Appellant.

Decided June 2, 1965

Appeal from the United States District Court
for the Eastern District of Michigan,
Southern Division

DECISION OF COURT OF APPEALS

Before: WEICK, Chief Judge, MILLER and PHILLIPS, Circuit Judges.

PER CURIAM. This is a direct appeal from a judgment of conviction on a guilty verdict by a jury in the United States District Court for the Eastern District of Michigan on an information charging appellant Broadnax with possession of one-half gallon of nontaxpaid whiskey, in violation of Title 26, United States Code, Sections 5205(a)(2) and 5604(a)(1).

Appellant's first contention is that the search warrant under which the Government agents entered his home, found the whiskey under his bed and arrested him, was invalid in that it was obtained upon an insufficient showing of probable cause, and that his motion to supress the evidence should have been sustained. The affidavit for the

search warrant alleged that the affiant was reliably informed that the defendant, a known violator, was handling large amounts of nontaxpaid whiskey at his residence. The affiant observed the defendant in the process of carrying what appeared to be a gallon jug in a paper sack from his car into his home and later saw him carry two cartons capable of containing four gallon jugs from his automobile into his home. We think the affidavit which describes several personal observations by the affiant of a similar nature is sufficient. *United States v. Nicholson,* 303 F(2) 330, C.A. 6th, cert. denied, 371 U.S. 823; *United States v. Malugin,* 200 F. Supp. 764, M.D. Tenn., affirmed, 296 F(2) 741, C.A. 6th; *Jones v. United States,* 362 U.S. 257, 269.

Appellant further contends that the evidence was insufficient to sustain his conviction. Although he moved for judgment of acquittal at the close of the Government's case, he failed to renew such motion at the close of all the evidence. Consequently, the sufficiency of the evidence is not open for consideration on this review. *United States v. George,* 319 F(2) 77, 79, C.A. 6th, cert. denied sub nom. *Gulley v. United States,* 375 U.S. 942, rehearing denied, 375 U.S. 998; *United States v. Gosser,* 339 F(2) 102, 110, C.A. 6th.

Appellant further contends that the Court erred in permitting the Government to show that he owned the automobile found in the garage which was covered by the search warrant, in which the agents discovered seven gallons of non tax paid whiskey. A codefendant, Smith, but not the appellant, was charged in the second count of the information with the illegal possession of this whiskey. It is argued that the admission of this evidence tended to prove appellant guilty of a crime not charged against him in the information. It is generally held that where a defendant has been charged with the commission of a particular offense, the Government may introduce evidence of similar conduct to show a pattern, intent or purpose. *Grant v. United States,* 255 F(2) 341, 342, C.A. 6th, cert. denied, 358 U.S. 828; *United States v. Sebo,* 101 F(2) 889, 891, C.A. 7th; *United Cigar Whelan Stores Corp. v. United States,* 113 F(2) 340, 347, C.A. 9th. See: *United States v. Krulewitch,* 145 F(2) 76, 80, C.A. 2nd.

The judgment of the District Court is affirmed.

APPENDIX C

No. 16012

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,
v.
William Broadnax,
Defendant-Appellant.

ORDER

(Filed August 4, 1965)

Before: WEICK, Chief Judge, MILLER and PHILLIPS, Circuit Judges.

Appellant's petition for rehearing having been considered by the Court;

It is Ordered that said petition be and is denied.

Entered by Order of the Court:

/s/ Carl W. Reuss
Clerk

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment to the Constitution of the United States provides:

> "The right of people to be secure in his person, houses, papers and effects against unreasonable search and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the persons and things to be seized."

STATUTES INVOLVED

Sections 5205(a)(2) and 5604(a)(1), Title 26 USC.

26 *U.S.C.* §*5205. Stamps.*

(a) Stamps or containers of distilled spirits—

(2) Containers of other distilled spirits—No person shall transport, possess, buy, sell or transfer any distilled spirits unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter.

26 U.S.C. §5604. Penalties relating to stamps, marks, brands and containers—

(a) General—Any person who shall

(1) Transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of Sec. 5205(a)(2) unless the immediate container thereof has affixed thereto a stamp as required

by such section, shall be fined not more than $10,000, or imprisoned not more than five (5) years, or both, for each such offense.

28 U.S.C., Sec. 1254(1):

"Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment of decree. * * *"

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 639

WILLIAM BROADNAX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of Michigan of the illegal possession of non-tax-paid liquor and was sentenced to imprisonment for three years, with eligibility for parole at any time. The conviction was affirmed in an opinion reported at 346 F.2d 119.

The sole issue raised is the sufficiency of an affidavit to support the search warrant pursuant to which the liquor in question was seized. The affi-

davit is set forth in full at pages 4-7 of the petition. It shows, *inter alia*, that the agent who applied for the warrant had received reliable information on May 17, 1961 that petitioner, a known violator, was handling illicit liquor at a given address and that deliveries were being made by a brown Ford at the alley at the rear of such premises. By personal observation on May 31, the agent saw a brown Ford drive into the alley, saw petitioner walk into the alley carrying what appeared to be a gallon glass jug covered with a paper sack, and saw the driver of the truck place the jug into the trunk of the Ford. About twenty minutes later, petitioner opened the garage doors of the premises and was present when the driver of the Ford carried from the garage two cartons of the size and shape commonly used to contain one gallon jugs of whiskey. In the morning on June 1, 1961, the brown Ford again appeared at the alley and the driver removed a carton of the size and shape used to contain gallon glass jugs. The driver was observed entering the back steps of the premises in question.

The personal observations of the agent, detailed in the affidavit, were sufficient to corroborate the information which the agents had been given. The totality of circumstances was therefore clearly sufficient to justify the issuance of a search warrant. *United States* v. *Ventresca*, 380 U.S. 102; *Jones* v. *United States*, 362 U.S. 257.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

OCTOBER 1965